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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted]216

FRED T. MACKEY, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FRED T. MACKEY, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on April 1, 1965.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. A1-A16) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra*, p. A17) was entered on April 1, 1965. A timely petition for rehearing and for rehearing en banc was denied on May 13, 1965 (Appendix B(2), *infra*, pp. A17-A18). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case of alleged tax evasion sought to be proved by the net worth method, where the prosecution contends that the defendant's unreported alleged excess income derived from his admitted operation of a policy wheel, and then argues that "Gambling is an occupation with indeterminate possibilities," it may properly allow him no credit for any currency on hand whatever at the beginning of the prosecution years on the strength of his pre-prosecution-year returns and of his refusal to make any statement to revenue agents in advance of trial concerning his cash on hand, in a situation where the defendant's mode of life does not suggest poverty or penury in any respect, and where the evidence shows that he transacted much business with currency throughout the entire prosecution period.

2. Whether, where the basic issue in a case of alleged tax evasion sought to be proved by the net worth method turns on whether the defendant's unreported alleged excess income of $4000 per week came from the policy wheel operation that he admited conducting, or from unrecorded premium income earned by insurance companies that he controlled (which in those years did not need to be reported), and 830 pounds of insurance company records are produced in court pursuant to a prosecution demand, and a prosecution witness then testifies to the presence of 300 additional pounds of similar records in another office, the prosecution has complied with its duty of tracking down relevant leads when, after two weeks' opportunity to study the first group of records and a similar period of time to obtain the others,

it never offers any of the 1100 pounds of records or even any summary of them into evidence.

STATUTE INVOLVED

The statute under which petitioner was prosecuted, though nothing turns on its terms, was § 7201, I.R.C. 1954, which provides as follows:

> "§ 7201. Attempt to evade or defeat tax
>
> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT

The facts necessary to place in their setting the questions now raised can be briefly stated.

A. The basic facts.

Petitioner was indicted in five counts for violation of § 7201, I.R.C. 1954 (*supra*), that alleged willful attempts to evade and defeat income taxes for the years 1956 through 1960 by filing knowingly incorrect returns (R. 13-20).[1] Following a trial lasting seven weeks (R. 3-7), and jury deliberations that covered parts of five days (R. 1970-1978), he was convicted on all counts (R. 1978), and sentenced to five years' imprisonment and a fine of $10,000 and costs on each count, the sentences to imprisonment to run concurrently

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[1] The first (March 1963) indictment (R. 13-17) was superseded as to its last four counts by a second indictment filed in October 1963 (R. 17-20).

"R." refers to the petitioner's appendix below, which contains the bulk of the record, "P.R." to the prosecution's appendix, which extends to only 49 pages.

(R. 66-70). He paid the fines and costs, aggregating over $65,000 (R. 78), after which, on appeal (R. 72-73), the convictions were affirmed (Appendices A and B(1), *infra*, pp. A1-A17). On rehearing one sentence of the opinion was deleted (*infra*, p. A15), but in all other respects rehearing was denied, by the division that heard the case as well as by the full court (Appendix B(2), *infra*, pp. A17-A18).

The prosecution used the net worth method to prove its case, asserting that the net worth of the petitioner and his wife at the starting point, December 31, 1955, was $361,461.52, and at December 31, 1960, was $1,519,744.05, an alleged increase of over $1,250,000 in a five year period during which petitioner and his wife reported $143,339.24 of taxable income (Govt. Exs. 9-13,800-802; R. 2103-2153).

For purposes of this petition, we adopt the formulation of the principal issue at the trial set forth in the opinion below (*infra*, pp. A2-A3; footnote omitted):

> "Government used the net worth method to prove its case. Government's theory at the trial was as follows. The net worth of defendant and his wife at the starting point, December 31, 1955, was $361,461.52 and their net worth at the end of 1960 was $1,519,744.05. These amounts included assets held in the names of the Gibraltar insurance companies (discussed *infra*) and other nominees for the benefit of defendant. During this five-year period defendant and his wife reported $143,339.24 of taxable income.
>
> "Government contended that the Gibraltar Industrial Life Insurance Company (Gibraltar Industrial), Gibraltar Mutual Life Insurance Company (Gibraltar Mutual) and the M.W.E. & S. Investment Company, Inc., were entirely under defendant's dominion and control. It is asserted these companies had three safes into which flowed an average of about $4000 per week in currency during the five prosecution years, in excess of the sums which could be accounted for by the combined gross receipts of the companies, plus the income reported by defendant and his wife, and that defendant helped himself to this excess at will.

"Government's theory was that the source of defendant's excessive net worth increases was a policy wheel operation which defendant admitted conducting and that the excess of $4000 per week, *supra,* was from profits earned by defendant on this operation."

B. Did the prosecution's opening net worth statement properly deny petitioner any credit for currency on hand at the beginning of the period?

There is no dispute between the parties over the fact that the prosecution credited petitioner with no currency on hand whatever at the opening of the prosecution years (Govt. Ex. 800, R. 2104).

Special agent Brunk had an informal interview with petitioner in April 1960 (R. 1339-1340), in the course of which petitioner stated he was a policy operator, but, on the advice of his counsel, who was present, did not answer the agent's questions regarding his net worth, his assets and liabilities, or his cash on hand.

Revenue agent Kallimani traced the income tax return filing history of petitioner and his wife from 1929 to the commencement of the prosecution period (R. 1344-1348; Govt. Ex. 96, 97, 759, 760; P.R. 27-28). Kallimani testified (R. 1360) that "Based on my computation, he could not have had anything at the beginning of 1956." Harrington, however, the prosecution's principal expert, computed petitioner's net worth on this same date as $361,461.52 (Govt. Ex. 800, R. 2103-2151).

Revenue agent Harrington, who prepared (R. 1420) the net worth statement (Govt. Ex. 800, R. 2103-2151) used in the present case, explained his failure to give petitioner any credit for cash or currency on hand on the opening day in these terms (R. 1427):

"The cash on hand, as far as any direct evidence, there is no evidence of the amounts of cash on hand for December 31, 1955-1956, all the way through the net worth period. Any figure that I would put there

would be purely arbitrary on my part. It is possible that Mr. Mackay may have had $10,000, or any amount as of any one of these dates. I would say, as far as the record goes at this present time, the facts and circumstances with respect to each of these dates is the same. For that reason, I did not place any amounts there."

He testified further concerning the same item (R. 1661):

"I don't know how much cash he had on hand. There is no statement to the effect of X number of dollars. My explanation was that there was no evidence as to the amount of cash on hand, and if I were to select any figure, I believe even zero, as you point out might be considered arbitrary.

"Not knowing the increases or decreases of cash on hand, this is a factor that could influence the increase or decrease in net worth."

Harrington admitted that the Internal Revenue Service had made no effort to determine petitioner's currency on hand, except for the conference at which the latter on the advice of counsel refused to discuss that subject (R. 1661-1662); admitted hearing evidence at the trial of many of petitioner's transactions that were all handled with currency (R. 1662); admitted that petitioner must have had currency on hand over the years (R. 1662); and then testified (R. 1662-1663):

"Q. And notwithstanding that fact, you have determined that the cash on hand at the end of each year, December 31, was nothing; is that correct?

"A. I don't think I actually made a determination to any amount.

"Q. That is true.

"A. I said there would be factors there that would have to be considered in order to determine how much cash on hand there were, and there is no evidence in the record as to any exact amount of cash on hand,

but the fact that there was currency transactions would indicate that there would be cash on hand over the periods."

In the court below the prosecution argued (Pros. Br., C.A. 7, p. 5), citing Govt. Exs. 9-13, 765, and R. 1340, that

> "It was the Government's theory that the source of appellant's excessive net worth increases during the prosecution years was the policy wheel (numbers banker) operation which he was admittedly conducting during those years."

On the question whether the prosecution had sufficiently established an accurate starting point in its net worth computation, the court below said (*infra*, p. A12):

> "Whether defendant had substantial sums of cash at the starting point is a matter within defendant's knowledge. Under the circumstances such as those in this case, where Government conducted a thorough investigation and failed to uncover evidence of cash on hand, the burden is on defendant to come forward with evidence of cash and he remains quiet at his peril. See *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954), and *United States* v. *Holovachka*, 7 Cir., 314 F. 2d 345, 354 (1963)."

Further in the course of its opinion, the court below said (*infra*, pp. A13-A14):

> "Defendant stated '[t]here was no direct evidence of * * * a likely source of current taxable income for each of the years 1956 through 1960.' Defendant concedes that he was a policy wheel operator during the years in question. There was no direct evidence that any of defendant's alleged unreported income was evidence is not required. '[P]roof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient.' *Id.* at 138. The following language in *United States* v. *Costello*, 2 Cir., 221 F. 2d 668, 671-672 (1955), affirmed, 350 U.S. 359 is applicable: 'There was no difficulty in the case at

bar in pointing to such a [likely] source. By his own admission * * * [defendant] was a gambler * * *. * * * Gambling is an occupation with indeterminate possibilities * * *.'"

C. Did the prosecution properly track down the relevant lead supplied by the more than 1100 pounds of Gibraltar Industrial Life Insurance Co. records?

Mrs. Benford, petitioner's sister (R. 497) and treasurer of the Gibraltar Industrial Life Insurance Co. of Gary, Indiana (R. 497, 772-773), testified that its books and records were complete with respect to its income (R. 775-777, 978-979). Those books were the basis for the annual reports submitted by the company to the Indiana State Department of Insurance (Govt. Exs. 125-129) and for its Federal income tax returns (R. 305-307, 777-779, 792-793, 1250-1251). The company's Federal income tax returns that were admitted in evidence (Govt. Exs. 22, 23) were prepared from the Indiana insurance reports (R. 305-307).

Mrs. Benford further testified, on direct examination, that the company received premium income which was not recorded on its books (R. 783-784, 787-788, 808-810), and which on cross-examination she estimated to range from $2500 and $3300 a week in 1949 to $7000 or $8000 a week in 1959 and 1960 (R. 1227-1229). The prosecution thereupon called for the production of all of the company's records dealing with insurance policy applications (R. 1264-1265), and those records, in 16 boxes weighing 830 pounds in the aggregate, were produced on the next court day, January 2, 1964 (R. 1289-1291). In addition, a prosecution witness immediately thereafter testified that there were 300 additional pounds of applications in the company's Indianapolis office (R. 1313), but those other applications were never requested by the prosecution.

It was the company's position, based on the advice of its then counsel, that premium income during the years in question was not taxable and hence did not need to be

reported (R. 1225, 1226-1227), and at the trial the prosecution's principal expert, Harrington, agreed that this was correct (R. 1672, 1677).

Mrs. Benford's testimony regarding the amount of weekly premium income was corroborated by her son, Jenkins, the company's Executive Secretary (R. 1291-1292, 1293), who placed the weekly receipts during the years 1958 to 1960 at $7000 or $8000 (R. 1314), and by Brewer, one of the company's field supervisors (R. 1325), who estimated the premium receipts from the agents under his supervision at $4000 or $5000 weekly in the later years (R. 1326, 1336), and at $2000 to $3000 weekly in the earlier years (R. 1336).

The prosecution rested its case on January 15, 1964 (R. 1795). Most of the following day was taken up with motions (R. 1796-1855), at the close of which petitioner also rested (R. 1855). On January 17, the 830 pounds of records, which had then been available to the prosecution in the Clerk's office for over two weeks, were ordered released to the company (R. 7, entry for 1-17-64).

The only reason ever assigned by the prosecution for its failure to introduce the applications in evidence (Pros. Br., C.A. 7, pp. 26-27) was Jenkins' testimony (R. 1314) that "I imagine it will take two or three months to put them back together."

The court below disposed of this issue by saying (*infra*, p. A13):

> "Government is required to investigate and negate 'reasonable explanations *by the taxpayer* inconsistent with guilt' in order to establish its proof in a net worth theory case. *Holland* v. *United States*, 348 U.S. 121, 135 (1954). (Emphasis added.) However, defendant in this case did not furnish any explanation which would attribute his increased net worth to other than taxable income. Defendant had the right to remain silent but he did so 'at his peril.' *Id.* at 139."

REASONS FOR GRANTING THE WRIT

Ten Terms ago, when the net worth method of proving understatement of taxes was first examined here in detail, this Court concluded that "it is so fraught with danger for the innocent that the courts must closely scrutinize its use" (*Holland* v. *United States*, 348 U.S. 121, 125). But the admonitions and the cautions that were there painstakingly formulated with precision and specificity have been either verbalized away or else completely disregarded in the present case, and an arbitrary assumption regarding the essential element of opening currency on hand that no less than four circuits have rejected in civil deficiency cases, which start with the presumption that the Commissioner is right and the taxpayer wrong, has here been permitted to supply vital proof in a criminal case, where the presumption is that the taxpayer is innocent and therefore right. The result, therefore, is that the present criminal trial has with the approval and approbation of the court below been turned, in substance and effect, into a show-cause proceeding, where the accused person must himself come forward at his peril to supply items of evidence essential to the prosecution's case, and, ultimately, to establish innocence.

The abuses of the net worth method reflected in the present record, in palpable disregard of this Court's considered warning that the "pitfalls inherent in the method • • • require the exercise of great care and restraint" (*Holland* v. *United States, supra,* at 129), strongly suggest that now, almost eleven years later, it is once more appropriate and indeed necessary for this Court to scrutinize what appears to have become the Government's routine prosecution technique in criminal tax cases.

First. "We agree with petitioners," this Court said in *Holland* at 132, "that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which

to calculate future increases in the taxpayer's assets." *Accord, Smith* v. *United States,* 348 U.S. 147, 155.

This "essential condition" is notably absent here. Passing the point that the prosecution's investigation of cash and currency on hand had on the testimony of its principal expert been of a most sketchy nature (*supra,* p. 6), it is plain from this record that the prosecution failed in its "duty * * * of approaching the problem fairly and open-mindedly, as a question of getting at business or economic reality, regardless of the fact that the taxpayer may be a revenue delinquent * * *." *Gunn* v. *Commissioner,* 247 F. 2d 359, 362 (C.A. 8).

Instead, the approach of the prosecution and of both courts below was that of heads-we-win-tails-you-lose. The petitioner was shown to be engaged in gambling, "an occupation with indeterminate possibilities" (*United States* v. *Costello,* 221 F. 2d 668, 672 (C.A. 2), affirmed on other grounds, 350 U.S. 359), but he was not credited with a single penny in currency at the beginning of the net worth period. Similarly, although the prosecution made much in its closing arguments of the many transactions petitioner handled with large sums in currency (R. 1868, 1869, 1874, 1875, 1916, 1917, 1922, 1927), it prosecuted him on the categorical assumption that he had no currency on hand at the beginning, an admittedly arbitrary figure cloaking the fact that no real effort had ever been made to ascertain the real sum (*supra,* pp. 6-7).

Here all the evidence pointed to the fact that petitioner's cash on hand was certainly substantial at the starting point. Gambling, quite as much as the purchase of produce from farmers (*Gunn* v. *Commissioner,* 247 F. 2d 359, *supra*), requires currency on hand; and here there was no countervailing evidence: Petitioner had not lived a life of penury or privation, as in *Holland* v. *United States,* 348 U.S. at 133, and *Friedberg* v. *United States,* 348 U.S. 142, 144; there was no proof that he had originally been a person

of modest means, as in *Smith* v. *United States,* 348 U.S. 147, 149, 157-158; there was no proof that he had ever permitted obligations to go unpaid, as in *United States* v. *Costello, supra,* 221 F. 2d at 672-673; the proof plainly negatived any earlier submission on his part of a net worth statement, as in the same case, 221 F. 2d at 672; and in view of his proved occupation of gambling, a fact relevant to establish that he had previously been engaged in that business (*Johnson* v. *United States,* 318 U.S. 189, 195-196), there was obviously no inherent improbability in his having had large sums of currency on hand at the beginning. Indeed, to conclude the contrary involves "a mathematical artificiality", that is "unrealistic as a general or business fact." *Gunn* v. *Commissioner, supra,* 247 F. 2d at 364.

In the face of what the prosecution proved regarding petitioner's occupation, and the lack of any evidence whatever that he had ever been in straitened circumstances, the testimony regarding his earlier tax return history concluding with revenue agent Kallimani's triumphant assertion (R. 1360) that "he could not have had anything at the beginning of 1956," quite fails to establish that fact; such a history is equally consistent with his failure to make accurate returns earlier. After all, agent Harrington, the prosecution's expert, fixed petitioner's net worth at the beginning of 1956, not at zero, but at $361,461.52 (Govt. Ex. 200, R. 2103-2151). In any event, in a net worth case seeking to prove unreported income in years not barred by limitations, the prosecution can hardly rely on the defendant to supply evidence of currency on hand by testimonial admissions that he may have violated § 7201 in other and earlier years on which the statute has run.

All that the prosecution showed, accordingly, was that, since petitioner did not himself state how much currency he had on hand, since it did not know—Harrington, the expert, said categorically (R. 1661) that "I don't know how much cash he had on hand"—since it made no real

effort to know, and since it could not allege violations by him in earlier years, therefore petitioner should not be credited with any currency on hand whatever at the starting point, even though the prosecution's key expert recognized (R. 1662-1663) that "the fact that there were currency transactions would indicate that there would be cash on hand over the periods."[2]

This precise approach, this revenue agent technique of giving no credit whatever for currency on hand simply because no effort at ascertainment of currency on hand was ever made, this bald assumption that "X Equals Zero," has been consistently rejected by the courts in decisions rendered subsequent to the guideline ruling here in *Holland* v. *United States*, 348 U.S. 121.

It was rejected by the Second Circuit in *United States* v. *Costello*, 221 F. 2d 668, 673, a criminal case, in respect of the count on which conviction was reversed. It was rejected by the Court of Claims in *Meyers* v. *United States*, 133 C. Cls. 123, 128, 134 F. Supp. 520, 523, a refund case where the taxpayer must prove the precise amount of tax due in order to succeed: "The most important part of a net worth computation is the beginning net worth and the most important part of that is cash on hand." And it has been rejected by four circuits in civil deficiency cases, where, quite unlike the situation in a criminal case, the presumption in favor of the Commission's determination operates against the taxpayer. *Marcella* v. *Commissioner*, 222 F. 2d 878 (C.A. 8); *Thomas* v. *Commissioner*, 223 F. 2d 83 (C.A. 6); *Thomas* v. *Commissioner*, 232 F. 2d 520

[2] The summary of Harrington's testimony in the opinion (pp. A11-A12)—"Treasury agent Edward Harrington testified that investigation had not revealed any cash on hand at any time in the net worth period and that if he had included a figure for cash at the starting point such figure would have been purely arbitrary"—is, to speak very mildly indeed, hardly a fair summary of Harrington's testimony at R. 1427 and R. 1662-1663 quoted *supra*, at pp. 5-7.

(C.A. 1); *Phillips' Estate* v. *Commissioner*, 246 F. 2d 209 (C.A. 5); *Gunn* v. *Commissioner*, 247 F. 2d 359 (C.A. 8); *Grubb* v. *Commissioner*, 315 F. 2d 753 (C.A. 6). We note in the margin some formulations of the prevailing principle.[3]

A fortiori, then, the plainly arbitrary conclusion here that petitioner had no currency on hand at the beginning cannot stand in a criminal prosecution to supply what this Court and so many others have held to be an essential element of the proof, viz., a reliable opening net worth statement.

Here the court below said (*infra*, p. A12) that "where Government conducted a thorough investigation and failed to uncover evidence of cash on hand, the burden is on defendant to come forward with evidence of cash and he remains quiet at his peril." Passing the point that there was no evidence that the prosecution's investigation of currency on hand was indeed thorough, see Harrington's evidence quoted *supra* at pp. 5-7, the vice of the quotation is that it quite misstates the test laid down here. What this Court said in *Holland* was quite different (348 U.S. at 138-139):

> "*Once the Government has established its case*, the defendant remains quiet at his peril."

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[3] "The presumption which favors the determinations of the Commissioner is not to be regarded as meaning that any arbitrary figure assigned to the cash on hand account without support in the record must nonetheless be treated as conclusive in the absence of an affirmative showing by the taxpayer of the correct amount. * * * nor is it appropriate for the Tax Court to fix an arbitrary figure unsupported by evidence simply because the taxpayer has made no affirmative showing to the contrary." *Thomas* v. *Commissioner*, 232 F. 2d 520, 524, 525 (C.A. 1).

"Yet although the petitioners here had the burden of proving that the Commissioner's determinations were wrong, if they did so, it was not incumbent on them to prove that they owed no tax, or what was the tax that they did owe." *Thomas* v. *Commissioner*, 223 F. 2d 83, 88 (C.A. 6).

We have added the italics, because here the Government had in fact not established its case: It had failed utterly to prove the "essential condition in cases of this type," namely, the "establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets" (*Holland* at 132). For, as the Fifth Circuit said in the *Phillips' Estate* case, 246 F. 2d at 213, "* * * the inference of unreported income can be drawn only if, and the if is a big one, a starting, opening net worth statement is established with some reliability. * * * If the opening statement is not substantially reliable, the whole intricate house of cards falls."

Second. Among the specific guidelines emphasized in the *Holland* case was the prosecution's duty to "track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence" (348 U.S. at 135-136).

We accept the statement of the prosecution and the court below that the major contested issue at the trial was whether the source of petitioner's net worth increases of "$4000 per week was from the policy wheel operation or from unrecorded and unreported premium income earned by the Gibraltar companies" (*infra*, p. A3).[4]

Obviously those companies' policy applications constituted a relevant lead. Equally obviously, after 16 boxes of such applications weighing 830 pounds had been physically produced in court in response to the prosecution's demand, and after a prosecution witness had testified to the presence of 300 additional pounds of applications in another of the company's offices (R. 1313), the prosecu-

[4] While we accept the quoted statement, we deem it proper to emphasize the agreement of both parties at the trial that during the tax years in question premium income was not taxable and was not required to be reported (*supra*, pp. 8-9).

tion had "leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence" (*Holland, loc. cit. supra*).

Therefore, again to quote from *Holland* v. *United States*, 348 U.S. at 136, "When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true, and the Government's case insufficient to go to the jury." But the trial judge here, disregarding this Court's admonition, denied petitioner's motion for acquittal (R. 1854), which had incorporated by reference (¶¶ 5 and 6, R. 1844-1845) arguments specifically rested on the prosecution's failure to track down these precise records (R. 1801-1802). And the court below strangely overlooked the 830 pounds of applications that had been produced and the 300 pounds of additional applications shown to exist, and hence quite misstated the record, when it said (*infra*, p. A13) that "defendant in this case did not furnish any explanation which would attribute his increased net worth to other than taxable income." When the court below then added, in its very next sentence, that "Defendant had the right to remain silent but he did so 'at his peril,'" citing *Holland* at 139, it not only quoted out of context (because what was there said by this Court followed the words "Once the Government has established its case"), it plainly disregarded as well what this Court had said in the same opinion regarding the prosecution's duty to track down relevant leads.

To conclude that, if the prosecution had indeed examined the 830 pounds of applications that were available to it for two weeks (*supra*, p. 9), its failure to introduce them (or even a competent summary thereof) meant that they were unfavorable to its case, is certainly not a far-fetched inference. *Clifton* v. *United States*, 4 How. 242, 247. And we should add that, while the prosecution's failure to make known what it had received pursuant to a demand dramatically put forward in the course of the trial high-

lights its lapse, its duty was actually far broader: The prosecution was bound as a matter of law to investigate a lead so obvious as the Gibraltar companies' applications before it ever sought an indictment.

What is primarily significant here, however, is that the court below gave no effect whatever to what this Court had solemnly declared to be a necessary safeguard in net worth cases, namely, the prosecution's duty to track down relevant leads—here not the possible or fanciful pursuit of unproved or vaguely suggested negatives, but a mass—literally a mass—of over half a ton of tangible documentary evidence.

Third. The matters noted above go to the heart of the net worth method, and the rulings thereon made below all too plainly brush aside as unimportant the structure of safeguards insisted on by this Court in the *Holland* case. It may be that, as the Eighth Circuit noted in *Gunn, supra,* 247 F. 2d at 362, "the fancifulness and tenuousness of such claims [of cash hoards by taxpayers in some cases] have also probably tended to a light treatment of the question of cash assets in other situations, without regard to apparent economic realities and persuasive commercial implications, unless the taxpayer has been able, by records or otherwise, to make definitive and inescapable demonstration."

But while this may well be an explanation for the disregard below of the cautions insisted on by this Court, it is not an excuse. Nor can the lapses in the present case be brushed aside as harmless error. This prosecution was far from open-and-shut, as the jury's five days of deliberation (R. 1970-1978) plainly show. Indeed, to recur to what another division of the court below said only recently, of a trial of comparable length similarly followed by long deliberations (*United States* v. *Wortman,* 326 F. 2d 717, 729):

> "* * * with a trial that lasted six weeks, it is a matter of grave doubt as to whether the verdict

reached after four days of deliberation resulted from a proper appraisement of the record, confusion or exhaustion."

CONCLUSION

The judgment below eliminates the safeguards required by this Court in net worth cases, and rests affirmance of a criminal conviction on an assumption that four circuits have rejected in civil cases where the operative presumption operates against rather than for the taxpayer. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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JUNE 1965.

APPENDIX A

Opinion Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964 — JANUARY SESSION, 1965

No. 14584

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRED T. MACKEY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

APRIL 1, 1965

Before HASTINGS, *Chief Judge,* and KILEY and SWYGERT, *Circuit Judges.*

HASTINGS, *Chief Judge.* Defendant Fred T. Mackey was indicted in March, 1963 in five counts for "willfully and knowingly attempt[ing] to evade and defeat a large part of the income tax due and owing by him and his wife for the calendar year[s] of 1956 [through 1960] by willfully preparing and causing to be prepared * * * false and fraudulent income tax return[s] * * * [i]n violation of Section 7201 Internal Revenue Code; 26 U.S.C. Section 7201."

A jury verdict and judgment entered thereon found defendant guilty on all five counts. Defendant was fined $10,000 and costs and sentenced to five years in prison on

each count, the prison sentences to run concurrently. Defendant paid the fine and costs which totaled $65,000. The district court stayed the judgment pending appeal and defendant appealed.

Government used the net worth method to prove its case. Government's theory at the trial was as follows. The net worth of defendant and his wife at the starting point, December 31, 1955, was $361,461.52 and their net worth at the end of 1960 was $1,519,744.05. These amounts included assets held in the names of the Gibraltar insurance companies (discussed *infra*) and other nominees for the benefit of defendant. During this five-year period defendant and his wife reported $143,339.24 of taxable income.

Government contended that the Gibraltar Industrial Life Insurance Company (Gibraltar Industrial), Gibraltar Mutual Life Insurance Company (Gibraltar Mutual) and the M.W.E. & S. Investment Company, Inc.,[1] were entirely under defendant's dominion and control. It asserted these companies had three safes into which flowed an average of about $4000 per week in currency during the five prosecution years, in excess of the sums which could be accounted for by the combined gross receipts of the companies, plus the income reported by defendant and his wife, and that defendant helped himself to this excess at will.

Government's theory was that the source of defendant's excessive net worth increases was a policy wheel operation which defendant admitted conducting and that the excess of $4000 per week, *supra*, was from profits earned by defendant on this operation.

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[1] The initials for this corporation apparently were derived as follows: "M" from defendant's name (Mackey), "W" from the middle name of defendant's son (Wardell), "E" from defendants wife first name (Ella) and "S' from defendant's daughter's first name (Sesame).

Government, in its brief, states that the main issue at the trial was whether this excess $4000 per week was from the policy wheel operation or from unrecorded and unreported premium income earned by the Gibraltar companies.

On appeal, defendant lists seventeen issues and states:

> "The principal errors relied upon are: the court refused to grant defendant ten peremptory challenges as provided in *Rule 24(b), Federal Rules of Criminal Procedure,* and was granted only eight such challenges; numerous errors in the admission of evidence, both oral testimony and documentary; failure to strike an admittedly incorrect and inaccurate net worth summary, Gov. Ex. 800 (consisting of 50 pages) and related exhibits 801, 802 and 803; failure of the government to meet the standards set down for net worth cases and the unconstitutionality of such method as applied to this case; failure to grant many defendant motions to suppress and strike evidence and for mistrial; denial of motion for acquittal made at conclusion of the government's case and after the jury verdict; in certain instructions given and refused and in repeating certain instructions to the jury during its deliberation; prejudicial remarks of the court; and the failure to hold a post-trial hearing upon the allegation that a petit juror was secretary to the foreman of the grand jury."

I

Defendant contends the district court committed reversible error by invoking a rule which limited him to eight peremptory challenges rather than permitting him ten as provided by Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A.

On the first day of the trial, the district court announced that Government would first have opportunity to exercise peremptory challenges and that upon exercising these challenges no further challenges would be allowed except as to new jurors who might come into the jury box as a result of challenges made by defendant. The court said the same

rule would apply to defendant. The effect of this rule was to permit each side one opportunity to challenge each prospective juror. Defendant objected to this rule.

Government did not exercise any challenges on its first opportunity. Defendant exercised eight peremptory challenges and tendered the panel back to Government. Government challenged one of the eight new members of the panel, accepted the juror who replaced this member and accepted the jury as then constituted. Defendant expressed the desire to exercise one or two of his remaining two peremptory challenges as to prospective jurors *other than the one who replaced the member challenged by Government.* The court ruled that defendant could only peremptorily challenge the new juror. Defendant objected to this ruling and did not challenge the new juror.

The manner in which peremptory challenges are exercised is within the sound discretion of the trial court, see *Pointer* v. *United States,* 151 U.S. 396, 410 (1894), and in the absence of violation of settled principles of criminal law, federal statutes or constitutional rights of defendant, such discretion is not abused. See *Id.* at 407, 408.

Defendant complains he was given only one opportunity to challenge each juror and that while he had the opportunity to exercise all ten of his peremptory challenges, the court's rule denied him the effective use of two challenges.

The Supreme Court approved a rule which gave each party only one opportunity to peremptorily challenge each juror. *St. Clair* v. *United States,* 154 U.S. 134, 147-148 (1894). The Supreme Court also approved a method which could deny a party the effective use of some of his peremptory challenges. In *Pointer* v. *United States, supra,* the trial court used a method of peremptory challenge by which all jurors were examined, thirty-seven found qualified to sit and each party given a list of these thirty-seven jurors. From these lists Government could strike five and defendant twenty names. Defendant argued, in essence,

that Government may have struck some of the same names which he struck and that Government should have been required to strike names before the list was tendered to him so that he would not waste his challenges on names struck by Government. The Supreme Court in upholding this method stated:

> "It is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government. But that circumstances does not change the fact that the accused was at liberty to exclude from the jury all, to the number of twenty, who, for any reason, or without reason, were objectionable to him. No injury was done if the government united with him in excluding particular persons from the jury. He was not entitled, of right, to know, in advance what jurors would be excluded by the government in the exercise of his right of peremptory challenge. He was only entitled, of right, to strike the names of twenty from the list of impartial jurymen furnished him by the court." *Pointer* v. *United States, supra* at 412.

Defendant places primary reliance on *Avila* v. *United States,* 9 Cir., 76 F. 2d 39 (1935). The majority opinion, which held that defendant was denied the constitutional right of trial by jury because the court denied him a peremptory challenge on the ground he had *waived* this challenge, appears to be based upon the trial court's failure to follow Rule 51 of the District Court for the Southern District of California. To the extent that the majority opinion does not rely on Rule 51, we disagree with it. We agree with the dissent filed in that case, to the effect that the trial court did not abuse its discretion by invoking a rule similar to the one in the instant case. 76 F. 2d 43.

In the instant case, the panel of prospective jurors was examined on *voir dire* by the trial judge in the presence of defendant; defendant understood that he would have but one opportunity to challenge each juror; and defendant

challenged eight jurors the first time the panel was tendered to him. He had an opportunity to challege one juror the second time the panel was tendered but chose not to do so. We conclude defendant had not been denied any statutory or constitutional right and hold the district court did not abuse its discretion in the rule it invoked for the use of peremptory challenges.

We disagree with defendant's contention that a new trial is required because petit juror Dolores Watkins did not state upon *voir dire* examination that she was employed by Leslie Ross Bain, the foreman of the grand jury which returned the instant indictment against defendant. There is no evidence that Watkins concealed this fact. She testified on *voir dire* that she was a secretary for the insursurance firm of Guffin, MacLennan & *Bain*.

II

Defendant urges that the manner in which the net worth method was applied in this case denied him due process of law and was unconstitutional. His reasons are as follows:

> "(a) asserts allegedly owned by the defendant, his wife, and three separate corporate entities are mixed together in the government's net worth statement; (b) starting point (Dec. 31, 1955) not correct; (c) assets included with no evidence connecting them to defendant or Mrs. Mackey; (d) amounts arbitrarily determined; (e) evidence does not establish ownership of asset by defendant or Mrs. Mackey as of December 31 for each of the years; (f) the net worth statement is based in part on a 13th juror; (g) failure to investigate; (h) lack of proof of current taxable income from a likely source for each year; and (i) willfulness not established."

In substance, defendant's assertions are that the evidence was insufficient to support the verdict and that evidence was admitted which was irrelevant and should have been excluded.

We have carefully reviewed the evidence in the light most favorable to Government and conclude that the net worth method was applied to defendant within the standards established in *Holland* v. *United States,* 348 U.S. 121 (1954) and there was sufficient evidence to support the jury's verdict.

Inclusion by Government of assets of three separate corporate entities in defendant's net worth statement.

Defendant's argument on this point is primarily concerned with Gibraltar Industrial. M.W.E. & S. conducted limited operations and defendant was given full credit in Government's net worth reconstruction for all income reported by M.W.E. & S. The exclusion from the net worth summary of the assets held in the name of Gibraltar Mutual would have reduced the total unreported income by only about 8%.

Gibraltar Industrial was chartered by the State of Indiana in 1920 and had offices in Indianapolis and Gary. The corporation had no stockholders. Defendant acquired an interest in it in 1947 and was chairman of the Board of Directors during the years named in the indictment (1956 through 1960). Defendant's sister, Mrs. Fannye Benford, was treasurer of Gibraltar Industrial during these years. She was responsible for the corporation's financial transactions. She received money coming into the corporation, paid all claims and bills, supervised employees and checked the bookkeeping.

During these years the president of Gibraltar Industrial was Bruce Mackey, Jr., a brother of defendant and the vice-president was Marion Davis, a son of defendant's uncle. The secretary from 1956 through 1957, William Mackey, is a brother of defendant. The secretary from 1958 through 1960, Ardie Jenkins, is defendant's nephew.

Gibraltar Mutual, like Gibraltar Industrial, was chartered by the State of Indiana, had offices in Indianapolis

and Gary, did not have stockholders and had defendant's above-named five relatives as officers during the years in question.

M. W. & E. Investment Co., Inc. was incorporated in Indiana in August, 1957. Early in 1959, the name was changed to M.W.E. & S. Investment Co., Inc. Until April, 1959, defendant and the three members of his immediate family (see footnote 1, *supra*) were the sole owners and officers of this corporation. On April 4, 1959, the corporation's minute book bore an entry indicating that 49% of the stock was being issued to certain named friends and relatives of defendant, including Benford, Jenkins, Marion Davis and Odie Davis (Marion Davis's father).

Harry Pettrie, a public accountant, testified that he prepared for Gibraltar Industrial the annual statements which are required for the Indiana Department of Insurance and federal income tax returns. He prepared these from Gibraltar Industrial's books and records which included the cash journal, bank statements and canceled checks. The assets held in the name of Gibraltar Industrial which were included in Government's reconstruction of defendant's income did not appear on the corporation's books and records and were not listed on the annual statements or federal income tax returns. Pettrie testified he was never informed the corporation was acquiring assets in the form of real estate and securities.

Benford (defendant's sister) testified on direct examination that the corporation's books and records from which the statements and returns were prepared were complete as to the corporation's income and financial transactions. On cross-examination, she testified the corporation received substantial premium income which was not recorded on the books and records and which was used to buy the assets listed in Government's statement of defendant's net worth. Government's prosecutor told the jury at least three times during his argument that if the jury believed

Benford's testimony to the effect that these assets were purchased by unreported premium income of Gibraltar Industrial and Gibraltar Mutual, then the jury must find defendant not guilty.

The annual statements prepared by Pettrie for Gibraltar Industrial disclosed that during the years 1956 through 1960, Gibraltar Industrial averaged $55,000 per year in net premiums. The statements further showed that during these years the corporation paid out in death benefits and sick and accident benefits to policyholders an average of $16,352.06 per year. Thus, according to the corporation's books and statements, it was annually paying out to policyholders an average of about 30% of its premium income. Defendant's argument that the assets in question were purchased by unreported premiums received by the corporation, if correct, would mean that policyholders were receiving in benefits approximately only 11% of the money they were paying as premiums.

This issue was properly submitted to the jury and there was ample evidence from which it could reasonably find that the assets in question were not purchased with income of the three corporations.

Defendant's net worth at starting point.

Government used the income tax returns of defendant and his wife from 1929 through December 31, 1955 as a guide in determining defendant's net worth at the starting point. The total income reported by defendant and his wife during these years was $181,465.77. Government did not deduct personal living expenses from this amount but did deduct the income taxes paid during this period, $22,306.04, leaving a balance of $159,159.73. Defendant's contentions that these income tax returns had no probative value, were irrelevant and were too remote, are without merit. The net worth of defendant and his wife at the starting point, December 31, 1955, including assets

held in the names of nominees, was computed by Government to be $361,461.52.

Defendant argues that "[t]he evidence conclusively established that the December 31, 1955 starting point (net worth) of $361,461.52 was *understated* by at least $62,721.65" and no amount of cash on hand was included for defendant.

Defendant states that the simple net worth statement which Government furnished defendant before trial established his net worth at the starting point to be $398,691.57 and that this figure properly includes $37,230.05, of which Government had knowledge, yet failed to include in its starting point net worth.

This net worth statement, which was introduced into evidence as Government's Exhibit 8, was, in essence, a bill of particulars. There is no merit in defendant's assertion that these items must be included in the starting point. There were several items contained in this statement, some of which favored defendant and some Government, which were not substantiated during the trial by admissible evidence. Government's starting point must be based upon items which are supported by evidence introduced during trial. It is certainly not unusual in cases of this type for the starting point as proved during the trial to vary from the bill of particulars or indictment which are prepared prior to trial.

Defendant asserts the following three assets were proved during trial, yet excluded from the net worth starting point:

"James Lees & Sons Stock	$ 2,841.76
W. F. Hall Stock	1,886.53
Central Indiana Gas Stock	7,187.70
Total	$11,916.99"

As to the first two items (Lees and Hall stock), evidence was introduced at trial that defendant bought them on

November 30, 1954, but there was no evidence as to the purchase price or whether the stock was sold at any time. In the absence of such evidence, it was not error to exclude these items from the starting point.

The third item (gas stock) was an asset of defendant at the beginning and end of the prosecution years and could not have affected unreported income. Thus, exclusion of this asset would not be prejudicial error. Government's net worth summary did include 190 of these shares at a cost of $3,063.95. The other 550 shares were excluded due to the absence of evidence as to their purchase price.

Defendant argues that Government's Exhibit 805 demonstrates Gibraltar Industrial had $25,491.60 in cash at the starting point and this amount should have been included in defendant's net worth at the starting point. We disagree. It appeared that this amount had been invested in assets of Gibraltar Industrial by the end of 1955 and thus could not have been in the form of cash. Further, Gibraltar Industrial's annual statement showed that as of December 31, 1955, the "Cash in Association's Office" was $4,379.44. The burden of proving that Gibraltar Industrial's cash was more than this amount was on defendant. See *United States* v. *Hornstein*, 7 Cir., 176 F. 2d 217, 220 (1949).

Defendant also argues there was evidence to show that Gibraltar Industrial had $590,506.12 in cash at the starting point. This argument is based upon testimony of Benford, defendant's sister, and Jenkins, defendant's nephew. The jury was entitled to disbelieve this testimony.

Government did not include any cash on hand in defendant's net worth at the starting date or at any point throughout the years in issue. Defendant claims this is prejudicial error.

Treasury agent Edward Harrington testified that investigation had not revealed any cash on hand at any time

in the net worth period and that if he had included a figure for cash at the starting point such figure would have been purely arbitrary.

During the investigation, a treasury agent asked defendant if he had substantial amounts of cash on hand but defendant's attorney advised him not to answer the question.

Whether defendant had substantial sums of cash at the starting point is a matter within defendant's knowledge. Under circumstances such as those in this case, where Government conducted a thorough investigation and failed to uncover evidence of cash on hand, the burden is on defendant to come forward with evidence of cash and he remains quiet at his peril. See *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954) and *United States* v. *Holovachka*, 7 Cir., 314 F. 2d 345, 354 (1963).

Sufficiency of the evidence to support the inclusion by Government of certain assets in defendant's net worth.

Defendant's brief lists several items which Government included in defendant's net worth. Defendant argues these should not not have been included. Defendant urges exclusion of these items because of insufficient evidence to connect these assets to defendant or his wife, arbitrary evaluation of the value of some of these items by Harrington and lack of evidence that defendant or his wife owned certain property at the end of the indictment years.

We have carefully examined each item listed and the contention made by defendant and find no prejudicial error in including these assets at their listed value in defendant's net worth. It would not serve any useful purpose to further lengthen this opinion by setting out the evidence pertaining to each item challenged by defendant.

Some of these items appear in defendant's net worth at the end of each year and thus could not affect any unreported income by defendant. Government's treasury agent Harrington testified concerning these items and explained

why the assets were included and how their value was arrived at. While in some instances there was evidence contrary to Government's evidence and Harrington's explanations, the issue of whether a specific asset was properly included in defendant's net worth was one of fact and properly submitted to the jury. Defendant makes the mistake of viewing the evidence in the light most favorable to him.

Defendant complains that Government did not offer evidence to show that he owned certain properties at the end of the years in question and argues that he *may* have sold these properties. He does not contend that he did sell them and his federal income tax returns did not list the sale of these properties. We find no error in the inclusion of these items in defendant's net worth.

Sufficiency of Government's investigation, establishment of likely source of income and establishment of willful evasion of income tax.

Defendant states Government is required to determine whether he and his wife received any loans, inheritances or gifts during the indictment years and whether defendant and his wife used a prior accumulation of funds during such years. He contends Government did not offer evidence that the above possibilities were investigated and that this constitutes prejudicial error.

Government is required to investigate and negate "reasonable explanations *by the taxpayer* inconsistent with guilt" in order to establish its proof in a net worth theory case. *Holland* v. *United States*, 348 U.S. 121, 135 (1954). (Emphasis added.) However, defendant in this case did not furnish any explanation which would attribute his increased net worth to other than taxable income. Defendant had the right to remain silent but he did so "at his peril." *Id.* at 139.

Defendant stated "[t]here was no direct evidence of * * * * a likely source of current taxable income for each

of the years 1956 through 1960." Defendant concedes that he was a policy wheel operator during the years in question. There was no direct evidence that any of defendant's alleged unreported income was obtained from his policy wheel operation. Direct evidence is not required. "[P]roof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient." *Id.* at 138. The following language in *United States* v. *Costello,* 2 Cir., 221 F. 2d 668, 671-672 (1955), affirmed, 350 U.S. 359 is applicable: "There was no difficulty in the case at bar in pointing to such a [likely] source. By his own admission * * * [defendant] was a gambler * * *. * * * Gambling is an occupation with indeterminate possibilities * * *."

Defendant argues in the alternative that assuming, *arguendo,* he failed to report taxable income for the indictment years, Government did not prove such failure to be willful.

The Supreme Court in *Spies* v. *United States,* 317 U.S. 492, 499 (1943) said that "willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal." In light of this language and evidence introduced at the trial, *e.g.,* recording of defendant's personal transactions on the books of Gibraltar Industrial and defendant's acquisition of property and putting title in the name of Gibraltar Industrial, we hold there was sufficient evidence from which the jury could reasonably find willfulness.

Harrington's testimony.

Defendant asserts that Government's expert witness, treasury agent Harrington, "usurped the exclusive func-

tion of the jury by weighing the evidence and determining its credibility" and he was, in effect, a "13th juror."

[Harrington apparently conducted much of the investigation which resulted in defendant's indictment.]* He testified at length concerning, *inter alia,* the assets which Government included in defendant's net worth at the starting point and end of each indictment year. Such evidence and explanatory testimony is admissible in cases of this type to aid the jury in understanding a complex fact situation. *United States* v. *Johnson,* 319 U.S. 503, 519 (1943). See *United States* v. *Doyle,* 7 Cir., 234 F. 2d 788, 794 (1956), cert. denied, 352 U.S. 893. We have read Harrington's testimony and do not find its admission to constitute prejudicial error.

III

Defendant raises various other issues, *inter alia,* whether the indictment was defective; whether the trial judge improperly admitted certain evidence; whether the jury was prejudiced by defendant's brother being called as a witness when Government allegedly knew he would plead the Fifth Amendment; whether the court erred in charging to defendant the cost of the court's copy of the transcript; and whether certain instructions were erroneous. We have carefully considered these and all other issues raised by defendant and find no prejudicial error.

In sum, Government introduced evidence from which the jury could reasonably find that defendant and his wife reported $181,465.77 on their income tax returns from 1929 through 1955; that their net worth as of December 31, 1955, including assets held in the names of nominees, was $361,461.52; that their net worth five years later was $1,519,744.05; that during this five-year period they reported

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* [The bracketed sentence was deleted and stricken by order dated April 27, 1965.]

only $143,339.24 of taxable income on their returns; that a likely source of this unreported income was defendant's policy wheel operation and that failure to report this income was willful.

We hold there was sufficient evidence to support the jury's verdict and no prejudicial errors were committed before or during the trial as would require a reversal of the judgment of conviction. Defendant received a fair trial.

The judgment of conviction appealed from is affirmed.

APPENDIX B

1. Judgment of Affirmance

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Thursday, April 1, 1965

Before Hon. JOHN S. HASTINGS, *Chief Judge,* Hon. ROGER J. KILEY, *Circuit Judge,* Hon. LUTHER M. SWYGERT, *Circuit Judge.*

No. 14584

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

FRED T. MACKEY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the

Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

---

2. Orders Denying Rehearing

a. Order denying rehearing

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Thursday, May 13, 1965

Before Hon. JOHN S. HASTINGS, *Chief Judge*, Hon. ROGER J. KILEY, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*.

No. 14584

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

FRED T. MACKEY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED that appellant's petition for a rehearing of this cause be, and the same is hereby DENIED.

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b. Order denying rehearing en banc

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Thursday, May 13, 1965

Before Hon. JOHN S. HASTINGS, *Chief Judge*, Hon. F. RYAN DUFFY, *Circuit Judge*, Hon. ELMER J. SCHACKENBERG, *Circuit Judge*, Hon. WIN G. KNOCH, *Circuit Judge*, Hon. LATHAM CASTLE, *Circuit Judge*, Hon. ROGER J. KILEY, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*.

No. 14584

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

FRED T. MACKEY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

IT IS ORDERED by the Court sitting en banc that appellant's petition for rehearing en banc be, and the same is hereby DENIED.

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780-223—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 216

FRED T. MACKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A16) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1965 (Pet. A16–A17) and a petition for rehearing was denied on May 13, 1965 (Pet. A17–18). The petition for a writ of certiorari was filed on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for income tax evasion proved by the net worth method, there was suffi-

cient evidence to establish with reasonable certainty petitioner's net worth at the beginning of the prosecution years.

2. Whether the prosecution had a duty, during the closing two weeks of a seven-weeks trial, to analyze and summarize a mass of basic insurance company records (policy applications) in order to foreclose the possibility that some of the unreported income charged to petitioner may in fact have arisen from unrecorded and unreported income of the insurance companies, where the defense produced the applications belatedly and in a state of disarray and where the books of the insurance companies—upon which the government relied—were in agreement with their federal income tax returns and their annual reports to the Indiana State Department of Insurance.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. (1958 ed.) 7201.)

STATEMENT

Petitioner was indicted in March 1963 on five counts charging tax evasion for the years 1956 through 1960 by causing false and fraudulent tax returns to be prepared, in violation of Section 7201 of the Internal Revenue Code of 1954. The total tax deficiencies alleged for the five-year period were $999,341.72. (A.A. 13–20.)[1] After a jury trial lasting seven weeks, appellant was convicted on all counts, fined $10,000 and costs, and sentenced to five years in prison. (A.A. 69–70.)

The government's case was proved by the net worth method. The evidence showed that the visible net worth of petitioner and his wife at the starting point, December 31, 1955—including assets held in the names of the Gibraltar insurance companies and other nominees for the benefit of petitioner—amounted to $361,461.52, a figure substantially greater than all of the income reported by appellant and his wife since 1929; that, by the end of the prosecution years, this visible net worth had increased to more than one and a half million dollars, although during that five-year period petitioner and his wife had reported only $143,339.24 of taxable income; and that petitioner had a likely source of taxable income in the policy wheel (numbers banker) operation which he admittedly carried on throughout the years in

[1] The designations "A.A." and "G.A." refer to the Appellant's Appendix and the Government's Appendix in the court below. The March 1963 indictment was superseded as to its last four counts by an indictment filed on October 2, 1963, making only minor changes in the original allegations. (A.A. 17–20.)

question. (Govt. Exs. 9 through 13—Schedule C, 96, 97, 730, 759, 760, 765, 800; A.A. 1340, 1344–1348, 2102 *et seq.*; G.A. 27–28.)

The amounts of taxable income and income tax liabilities reported on petitioner's returns compared with the correct amounts, as proved at the trial, are as follows (Govt. Exs. 9 through 13, 800 through 802; A.A. 2103–2153):

Taxable income

Year	Correct amount	Reported amount	Unreported income
1956	$209,108.95	$17,315.54	$191,793.41
1957	350,681.63	13,452.72	337,228.91
1958	378,408.95	33,884.68	344,524.27
1959	138,157.27	39,593.38	98,563.89
1960	72,078.06	39,092.92	32,985.14
Total	1,148,434.86	143,339.24	1,005,095.62

Income tax

Year	Correct amount	Reported amount	Unreported tax
1956	$134,508.61	$3,209.08	$131,299.53
1957	255,277.42	2,015.45	253,261.97
1958	279,213.45	9,353.31	269,860.14
1959	77,456.38	12,097.89	65,358.49
1960	31,503.62	11,946.68	19,556.94
Total	777,959.48	38,622.41	739,337.07

In addition to his policy wheel business, petitioner operated the Gibraltar Industrial Life Insurance Co. and the Gibraltar Mutual Life Insurance Co. and, beginning in 1957, the M.W.E. & S. Investment Co., Inc. The principal issue at trial was whether the government was justified in including in petitioner's

net worth certain assets acquired in the names of the Gibraltar companies.[2] (Cf. Pet. 15.)

Gilbraltar Industrial, which was chartered by the State of Indiana, maintained offices in Indianapolis and Gary. (Govt. Exs. 125–129; A.A. 1128–1129, 1564–1565.) Although the corporation had no stockholders, petitioner acquired an interest in it in 1947 and was chairman of the board during the years named in the indictment. (Govt. Ex. 113; A.A. 499, 1293, 1572–1573; G.A. 34.) All of the officers of the company were related to petitioner by blood. (Govt. Exs. 125–129; A.A. 497, 546, 576, 583, 743, 753, 1291–1293). The company's office was run by Mrs. Fannye Benford, petitioner's sister (A.A. 497). As treasurer, she was responsible for all of the company's financial transactions (A.A. 499, 772–773, 869, 916, 1293). At the trial, Mrs. Benford first testified that the books and records were complete with respect to the company's income and financial transactions (A.A. 775–777, 978–979), but later testified that the company received substantial premium income which was not recorded (A.A. 1227–1229). These books, however, were the basis for the annual reports submitted by the company to the Indiana State Department of

[2] Because petitioner and the members of his immediate family owned the M.W.E. & S. Investment Co., Inc., and because the income reported by that enterprise may account for some of the net worth increases, the above tabulations of unreported income and tax take into account (*i.e.*, give petitioner credit for) the income reported by M.W.E. & S.—totalling $39,971.35—from the time of its incorporation in 1957 (Govt. Exs. 14–16, 802; A.A. 2153).

Insurance and for the federal income tax returns. (A.A. 305–307, 777–779, 792–793, 1250–1251.) The annual reports to the State of Indiana disclosed that during the five prosecution years the company operated at a loss, realizing gross income of $283,620.58 and disbursing $310,927.17. (Govt. Exs. 125–129.) The company's federal income tax returns for 1958 and 1959 (those for other years having been excluded from evidence) were in substantial agreement with these annnual reports. (Govt. Exs. 22, 23; A.A. 305–307.) The accountant who prepared the reports and returns was never informed that Gibraltar Industrial was acquiring real estate and securities, or that it was making loans, or that there was a bank account in its name into which large deposits were made, or that it had any assets outside of the United States. (Govt. Exs. 481–483; A.A. 841–845, 1286–1287.)

Gibraltar Mutual, like Gibraltar Industrial, was chartered by the State of Indiana, maintained offices in Indianapolis and Gary, and had no stockholders. (A.A. 297, 1567, 1578.) Petitioner began with a $35,000 investment in the company in 1954, added $5,000 in 1959 and another $13,000 in 1960. (G.A. 1.) The officers of the company during the prosecution years included no one except the same five relatives of petitioner (who was chairman of the board) listed as officers of Gibraltar Industrial (Govt. Exs. 140–144; G.A. 35–40). Mrs. Benford, the treasurer, testified that so far as she knew all receipts were recorded on the company's books. (A.A. 772–773, 821–826, 979–

980). The annual reports submitted to the State of Indiana disclosed that during the five prosecution years Gibraltar Mutual received gross income totalling $153,235.22 and made disbursements (including additions to reserves) totalling $154,109.91 (Govt. Exs. 140–144). The federal income tax returns, like those of Gibraltar Industrial, were prepared from the annual reports filed with the State of Indiana. (A.A. 821–826, 1284–1285.)

The Gibraltar companies were located in the same office as the M.W.E. & S. Investment Co., Inc., and the same employees who collected money for the insurance companies collected it for M.W.E. & S. (A.A. 368, 615–616, 862–863, 1057.) Incoming receipts were handled either by Mrs. Benford or by petitioner's secretary, who would record on the companies' books money received from policyholders who came into the office to pay their premiums. (A.A. 615–616, 675, 979.) There was evidence that transactions and funds of the insurance companies were sometimes commingled with those of petitioner and his M.W.E. & S. corporation. (Govt. Ex. 135, p. 6; A.A. 346, 452–453, 795–796; G.A. 27.) The Gibraltar Building itself, though its title was held in the name of Gibraltar Industrial, was reported each year as an asset of M.W.E. & S. on its federal income tax returns. (Govt. Exs. 14–16.)

Although the deductible expenses of the Gibraltar companies were, with rare exception, paid by regular bank check, the investments in securities, loans and real estate unrecorded on the books and unreported

on the tax returns and State Insurance Department reports were paid for in currency or by cashier's check. (A.A. 1268–1271.) Large sums were used to buy cashier's checks for the acquisition of real estate (A.A. 354, 1271–1272) and securities (A.A. 482, 550–551, 572), but the more common practice was to use currency, often in bills of $10 and $20 denominations (A.A. 414, 421). Securities, real estate and other assets acquired in the name of the Gibraltar companies—usually Gibraltar Industrial—were customarily purchased by petitioner with currency from one of the office safes. (A.A. 898–899, 919–920, 925, 933, 935, 937, 941–942, 947, 949–950, 952, 954–955, 964–966, 969, 972–973, 1018–1020, 1032–1033, 1037–1039, 1044–1045, 1067–1068, 1133–1134, 1136, 1197.) The largest single transactions related to petitioner's acquisition of stock in a fire insurance company. An official of that company received $50,000 in currency from petitioner with instructions to issue the stock in the name of Gibraltar Mutual. (A.A. 355–356.) Later, in 1958, petitioner gave the same official an additional $98,000 in currency for the purchase of more shares in the name of M.W.E. & S. (A.A. 360–361.) In 1960 petitioner bought an additional block of stock from another individual, paying him $15,000 in currency. (A.A. 654.)

In addition to the assets acquired in the names of the Gibraltar companies and M.W.E. & S., petitioner sometimes acquired property in the names of relatives, business associates, and once in the fictitious name of "Theodore Pillow". (A.A. 252–253, 268–270,

314, 378–379, 502, 544–548, 558, 572–577, 583, 590, 598, 745–747.) The evidence also established the creation by petitioner of a fictitious $200,000 mortgage liability on the Gibraltar Building. During the investigation petitioner told the Treasury agents that the building was encumbered by a mortgage in that amount, and such a mortgage was in fact listed on the federal income tax returns of M.W.E. & S., which were prepared by an attorney on the basis of information furnished him by petitioner. (Govt. Exs. 14–16; A.A. 883–886, 1341.) Mrs. Benford was unaware of any mortgage (A.A. 794) and the representative of the "mortgagee" testified that no consideration had changed hands, that there was no mortgage, and that his company had allowed petitioner to use its name as a favor to petitioner (A.A. 358–359).

ARGUMENT

1. There is no substance to the argument (Pet. 10–15) that petitioner was improperly convicted because the government's net worth summary gave him no credit for undeposited cash on hand at the starting point. The solidity of the starting point was established by (a) the exhaustive investigation by the Treasury agents, which disclosed no other assets; (b) the study of petitioner's lifetime income tax history, which showed that his total reported income—less income taxes paid—was less than his visible net worth at the starting point; (c) petitioner's failure to claim, either during the investigation or at the trial, any undeposited cash on hand at the starting point; and (d) evidence tending to discredit all of petitioner's

arguments with respect to *possible* undisclosed assets on hand at that time. (Pet. A9–A12; *supra*, p. 3; A.A. 1340, 2103 *et seq.*) This, together with the abundant proof that petitioner is a man who believes in putting his money to work for him, fully supports the jury's inference that at the end of 1955 petitioner did not have enough undeposited cash to impair the government's reconstruction of his unreported income. Cf. *Holland* v. *United States*, 348 U.S. 121, 138–139. Whether he had cash on hand at the various pertinent times is, of course, a matter peculiarly within the knowledge of petitioner, who refused to make any statement on the subject. (A.A. 1340.) In these circumstances the government was not required to credit him with cash on hand, having made a clear-cut *prima facie* case to support the starting point net worth. *Beard* v. *United States*, 222 F. 2d 84, 89 (C.A. 4th), certiorari denied, 350 U.S. 846; *United States* v. *Holovachka*, 314 F. 2d 345, 356–357 (C.A. 7th), certiorari denied, 374 U.S. 809.

The civil cases cited by petitioner (Pet. 13–14) are inapposite not only because they are distinguishable on their facts,[3] but because (1) in civil suits

[3] In *Grubb* v. *Commissioner*, 315 F. 2d 753 (C.A. 6th), the court held that the burden of proof as to cash on hand was on the Commissioner, and that the Tax Court's estimates of cash on hand were arbitrary and "based on a guess". (*Id.*, pp. 758–759.) Since the Commissioner's determination was found, even by the Tax Court, to be wrong, and since the Tax Court's determination was also wrong, the case was remanded for further inquiry into the amount of cash on hand. In the other civil cases relied upon by petitioner (Pet. 13–14) there was

both sides lay their cards on the table, either before trial or at trial, and the cash on hand is thus at least theoretically ascertainable; and (2) in civil cases it is necessary to determine, as accurately as possible, the exact amounts of the tax deficiencies. In criminal cases such precision is unattainable and unnecessary. *United States* v. *Johnson,* 319 U.S. 503, 517–518; *Holland* v. *United States,* 348 U.S. 121, 138.

2. Also unsound is the contention (Pet. 15–17) that the government failed to "track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." *Holland* v. *United States, supra,* pp. 135–136. The short of it is that petitioner refused to furnish leads. (A.A. 1340–1341.) The argument that the government, in the closing two weeks of the trial, should have analyzed and summarized the policy applications of the Gibraltar companies, weighing some 830 lbs., is frivolous. The government relied upon the companies' books, tax returns, and reports to the State of Indiana, as it was entitled to do, in ascertaining their assets, income and disbursements. *United States* v. *Hornstein,* 176 F. 2d 217, 220 (C.A. 7th); *United States* v. *Link,* 202 F. 2d

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substantial evidence of cash on hand which was ignored by the Commissioner and the trial courts.

In *United States* v. *Costello,* 221 F. 2d 668, 673 (C.A. 2d), affirmed on other grounds, 350 U.S. 359, a criminal case, there was before the court a great deal of evidence of the defendant's financial history for years prior to the prosecution period, which disclosed that "* * * in the past he had always kept such [cash] reserves in large amonuts."

592, 593–594 (C.A. 3d); *United States* v. *Bender*, 218 F. 2d 869, 871–872 (C.A. 7th), certiorari denied, 349 U.S. 920; cf. *Warszower* v. *United States*, 312 U.S. 342, 347. The petitioner's belated production of the policy applications[4] came much too late, for even if these records showed which policies had lapsed and when, and the amounts of the weekly premiums (and there is no indication that they did), it obviously would have been a physical impossibility to summarize them and compare them with the companies' books in the remaining days of trial.[5] The admonition in the *Holland* case as to the government's duty to track down leads refers to leads furnished to the Treasury agents during their investigation, not to possibilities suggested to the prosecutor near the close of the trial.

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[4] If these policy applications were relevant at all, they became so only when Mrs. Benford changed her testimony late in the trial, retracting her testimony that the Gibraltar companies' books were true and complete and now stating that substantial premium receipts were unrecorded. At that point, it became apparent that the companies were in possession of these policy applications and had failed to produce them in compliance with the trial subpoena, which called for the production of all books and records of the companies. The court then ordered their production. (A.A. 1264–1265.)

[5] The applications were in such a state of disarray that one witness estimated it would "take two or three months to put them back together." (A.A. 1314.)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1965

No. 216

FRED T. MACKEY, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONER'S REPLY MEMORANDUM

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It is of course entirely understandable that the prosecution should wish to insulate from scrutiny the present record, which so notably fails to follow the guidelines that this Court drew in *Holland* v. *United States,* 348 U. S. 121, a record that in particular ignores this Court's insistence on the strict enforcement, in net worth tax prosecutions as in all other prosecutions, of the basic principle that the Government must establish every element of the offense

charged, and that, until it does, the defendant need not come forward to supply evidence.

What is less understandable—indeed it is regrettable in the extreme—is that in seeking to defeat review of the sharp departures from *Holland* that inhere in the ruling below, the prosecution should have gone to such lengths to fudge both facts and law, particularly facts. Its demonstrable obfuscations leave us no alternative but to file the present short reply.

First. In response to the first question raised in the petition (Pet. 2, 10-15), whether the essential condition of an opening net worth had been established with reasonable certainty, the prosecution incorrectly sets forth the record and incorrectly states the law.

A. The prosecution's effort to distinguish the cases from five other circuits on which petitioner relies to establish conflict of decision (Pet. 13-14), on the ground that in the case at bar there was no substantial evidence of cash on hand (Br. Op. 10 and note 3), founders on the present record. Here there was in fact substantial evidence of cash on hand. The prosecution's expert himself recognized (R. 1662-1663) that "the fact that there were currency transactions would indicate that there would be cash on hand over the periods", and the prosecutor in his summing up dwelt heavily on the fact that petitioner had handled many transactions with large sums in currency (R. 1868, 1869, 1874, 1875, 1916, 1917, 1922, 1927).

B. Actually, the prosecution's expert neither testified nor assumed that this petitioner had no cash on hand. The expert's reason for assigning a figure of zero to petitioner's opening cash on hand was not the absence of cash, but only (R. 1661) that "I don't know how much cash he had on hand." The expert admitted that this technique was arbitrary (R. 1659, 1661)—and five circuits and the Court of Claims have condemned it in net worth cases.

Significantly, the prosecution's Brief in Opposition does not refer to this testimony by its expert.

C. The prosecution's reference (Br. Op. 9) to "the exhaustive investigation by the Treasury agents" is demonstrably without foundation. It cites nothing in the record to support that over-enthusiastic generalization, a circumstance perhaps not too surprising, because the record shows the precise contrary. The actual fact, as the prosecution's expert admitted on the stand, is that the Internal Revenue Service had made no effort whatever to determine petitioner's currency on hand, except for the conference at which the latter on the advice of counsel refused to discuss that subject (R. 1661-1662):

> "Q. Aside from the testimony concerning the one conference obtained by the defendant, what other testimony is there of any investigation by the Internal Revenue Service concerning an attempt to determine what the cash on hand was?
>
> "A. I know of none.
>
> "Q. As a matter of fact, aside from that one statement there is no testimony in this record of any investigation by the Internal Revenue Service to determine cash on hand at the starting point, is there, sir?
>
> "A. No, sir."

We cannot take seriously the prosecution's reference (Br. Op. 9) to "petitioner's failure to claim, either during the investigation or at the trial, any undeposited cash on hand at the starting point." For, as the prosecutor said in his opening statement (R. 216-217), and the prosecution's expert admitted on the stand (R. 1662), "it is the responsibility of the Government to establish the starting point." *Accord, Holland* v. *United States,* 348 U. S. 121, 132: "* * * an essential condition in cases of this type is the the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from

which to calculate future increases in the taxpayer's assets." Even in criminal tax cases, it is the responsibility of the prosecution to establish every element of the offense.

D. The prosecution's treatment of the civil cases relied on by petitioner (Pet. 13-15) is revealingly inaccurate.

The prosecution first ignores completely the basic distinction, which as stated in *Holland* v. *United States*, 348 U. S. 121, 126, is that "Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have prima facie validity, the prosecution must always prove the criminal charge beyond a reasonable doubt."

Next, the prosecution says (Br. Op. 11) that "in civil cases it is necessary to determine, as accurately as possible, the exact amounts of the tax deficiencies." The law is exactly to the contrary in deficiency cases. E. g., *Thomas* v. *Commissioner*, 223 F. 2d 83, 88 (C.A. 6), a case twice cited by petitioner (Pet. 13, 14), *per* Stewart, Circ. J.: "Yet, although the petitioners here had the burden of proving that the Commissioner's determinations were wrong, if they did so, *it was not incumbent upon them to prove* that they owed no tax, or *what was the tax that they did owe.*" We have added the italics.

Only in tax refund cases must the taxpayer "prove the facts upon which the correct tax can be determined." *Meyers* v. *United States*, 133 C. Cls. 123, 127, 134 F. Supp. 520, 523. Even there, the "X Equals Zero" formula on which the present conviction rests was flatly rejected, as we have already pointed out (Pet. 13). The prosecution does not even attempt to distinguish that decision, no doubt because it cannot.

Second. In order fully to appreciate the extent to which the prosecution apparently found it necessary to go in order to blur the record on the second question presented, viz., whether the prosecution performed its duty of tracking

down relevant leads, a few words are necessary to place that issue in its setting.

A. As the court below said (Pet. App. A3), the main issue at the trial was whether the excess of $4000 cash per week came from petitioner's policy wheel operation or whether it came from unrecorded and unreported premium income earned by the Gibraltar companies.

Gibraltar Industrial's treasurer, Mrs. Benford, testified on direct examination that the company received premium income which was not recorded on its books (R. 783-784, 787-788, 808-810), which on cross-examination she estimated to range from $2500 and $3300 a week in 1949 to $7000 or $8000 a week in 1959 and 1960 (R. 1227-1229). Passing the point that this testimony was later corroborated by two other prosecution witnesses (Pet. 9), the incident significant here is that, after Mrs. Benford had so testified, the prosecution called for the production of all of the company's records dealing with insurance policy applications (R. 1264):

> "Mr. McNelis [the prosecutor]: * * * I would like to have those records produced in connection with the trial of this case.
>
> * * * * * *
>
> "The Court: We are talking about the policy applications, are we?
>
> "Mr. McNelis: Yes, your Honor, the so-called debit books that we have just been discussing in the last few minutes.
>
> "The Court: Very well.
>
> "Mr. McNelis: I would like to have them produced for Thursday morning.
>
> * * * * * *
>
> "The Court: The records will be produced, any records that you have, no later than nine o'clock Thursday morning. You will take them to the Clerk's Office. * * *"

On the next court day, January 2, 1964, those records, in 16 boxes weighing 830 pounds in the aggregate, were accordingly produced (R. 1289-1291), and they remained available to the prosecution in the Clerk's Office until after the prosecution rested on January 15 (R. 1795; R. 7, entry for 1-17-64).

The record further shows that, at pretrial conferences, the prosecution had never specifically asked for the insurance applications in question although they were discussed (R. 1274-1275, 1290-1291).

B. Here is how the prosecution now treats this incident (Br. Op. 12):

> "The *petitioner's* belated production of the policy applications[4] came much too late * * *." [Italics supplied.]

Footnote 4, after saying that "it became apparent that the companies were in possession of these policy applications", concludes with "The court then ordered their production."

And the text concludes by asserting that the *Holland* case refers to leads furnished to the Treasury agents, "not to possibilities *suggested to the prosecutor* near the close of the trial". [Italics once more supplied.]

We submit it would be difficult for even the most gifted clairvoyant to gather from these quotations from page 12 of the Brief in Opposition—or indeed from anything else in that entire document—that it was the prosecution that had demanded the production of the records in question; that the court's order was issued, not *sua sponte,* but simply responsive to that demand; or that the records were produced, not by the petitioner, but by a third party, Gibraltar Industrial.

We cannot forbear to mention that the prosecution must entertain grave doubts of its legal position when it goes to

such obvious lengths to avoid disclosing to this Court, or for that matter to any reader of its Brief in Opposition, that it had itself called for the production of the records in question—and that after two weeks' opportunity to examine them, it had refrained from introducing them in evidence.

C. While the *Holland* case does indeed speak of the Government's duty to run down leads furnished by the taxpayer (348 U. S. at 135-136), we do not understand its holding to absolve the Government from the duty making full disclosure of leads it has itself uncovered and then obtained pursuant to its subpoena power. Surely if the Government's "interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done" (*Berger* v. *United States*, 295 U. S. 78, 88), and we are not aware that this standard has been in any respect whittled away in the thirty years since it was there formulated, the Government's obligation to track down leads exists regardless of their source—particularly after those leads have been tracked down and it has untrammeled access to the evidence.

Nor can the prosecution excuse its failure to produce the records it had acquired here because (Br. Op. 12, note 5) it would or might "take two or three months to put them back together." For one thing, it was neither a revenue agent nor the prosecutor who so stated; the quotation is from the testimony of Gibraltar Industrial's Executive Secretary (R. 1314), who was estimating, not how long it would take Government officers to examine the records, but how long it would take the company to rearrange them after they were returned.

But even if a proper examination of relevant records freely available to the prosecution might take several months, it should not be overlooked that petitioner's time is also involved. At this moment he is under a five year sentence (R. 66-70), in consequence, certainly in substantial

consequence, of the prosecution's failure to make known to the trier of the facts how the records in question bore on the principal issue at the trial.

Third. Eleven years ago, this Court in *Holland* cautioned prosecutors as well as courts concerning the dangers inherent in net worth prosecutions, and laid down carefully fashioned safeguards in order that those dangers might be avoided. Now the Court's safeguards are being ignored.

Specifically, this Court said (348 U. S. at 138-139; our italics) that "*Once the Government has established its case,* the defendant remains quiet at his peril." But here the court below has transformed this concept to mean that a defendant remains quiet at his peril at any time, even when all that appears (Pet. App. A12) is that the prosecution has "failed to uncover evidence of cash on hand." That is to say, when the Government is unable to establish its case, its failure to do so requires the defendant to come forward at his peril to supply the missing evidence. In short, under the holding below, the defendant must prove his innocence whenever the prosecution is otherwise unable to establish its case.

We believe, therefore, that the time has come, not for a new look at the net worth method in criminal cases—that is not necessary, the *Holland* standards afford ample guidance and protection—but for another look, the first since the date of that decision, to insure that its standards shall be respected. Here they have not been; here the court below accepted in a criminal case the assumption that, because the prosecution was unable to establish the amount of cash that the defendant had on hand at the opening, it follows that he had no cash on hand at all, an assumption that it considered confirmed when he would not come forward to supply the prosecution with the actual figure.

This is, of course, not only an erroneous assumption, but, as the prosecution's own witness admitted (R. 1659,

1661), an arbitrary one. It is moreover an assumption that four circuits and the Court of Claims have rejected in civil cases (Pet. 13-14), where the burden of proof is on the taxpayer, and where the presumption, quite unlike that obtaining in criminal prosecutions, is that the taxpayer owes more tax than he reported in his return.

Accordingly, for the foregoing additional reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

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